

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-167 (Sub- No. 1190X)



CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION –  
IN HUDSON COUNTY, NJ

ENTERED  
Office of Proceedings

OCT 06 2009

Part of  
Public Record

REPLY TO CONRAIL'S MOTION TO STRIKE

225882

1. Now come Eric Strohmeier, a non-carrier, and James Riffin, a carrier ("Offerors"), who herewith file this Reply to Conrail's October 2, 2009 Motion to Strike ("Motion").
2. The Offerors have 20 days within which to reply to Conrail's Motion. However, since Conrail has expressed a desire to expedite this proceeding, and since both Offerors desire to reply to Conrail's Motion to Strike, in an effort to accommodate Conrail's request to expedite this proceeding, the Offerors will file their replies separately, rather than take the extra 2 days it would take to file a combined reply,
3. Conrail objects to the amount of time it has taken to resolve this proceeding. The delay in this proceeding is due solely to Conrail's dilatory tactics. Conrail filed its Notice of Exemption on November 19, 2008. CNJ Rail Corporation timely filed its Notice of Intent to File an Offer of Financial Assistance and timely filed its request for the information Conrail must provide pursuant to 49 CFR 1152.27(a). Rather than immediately provide CNJ Rail with the requested information, Conrail elected to ignore CNJ Rail's request. Some eight months later, on July 28, 2009, Conrail finally provided CNJ Rail with the purchase price. This 8-month delay is solely chargeable to Conrail. The Offerors then timely (within the 10-days allowed) filed their Offer of Financial Assistance ("OFA"), and provided to the Board all of the information that they were required by statute to provide. The Board, on its own motion, then issued a Show Cause Order, directing the Offerors to provide, in only two weeks, detailed information to justify why the Board should not exempt the proceeding from the OFA procedures. The Offerors expeditiously

began to acquire that detailed information, and timely filed the information they had been able to acquire, by September 1, 2009. The Offerors continued to acquire information during the period of time the Board gave Conrail time to respond. Then New Jersey Transit (“NJT”) **untimely** filed a response, which raised new issues. The Board afforded the Offerors a limited amount of time (one week) to respond to NJT’s issues. The Offerors again timely filed their reply to the issues raised by NJT, and moved to supplement their previous filing with the additional shipper information they had obtained in the intervening time. The Offerors also requested permission to reply to the additional issues Conrail raised in its reply. And unlike Conrail, provided that additional information. Conrail, on the other hand, failed to include with its Motion whatever reply it desired to file. This failure to include its reply with its Motion, particularly in light of Conrail’s specific request for permission to reply, will further delay this proceeding.

4. The facts demonstrate the Offerors have consistently filed their pleadings in a timely fashion. The facts further demonstrate that all delays have been due to Conrail’s dilatory tactics, NJT’s untimely response, and due to the Board’s desire to obtain a more complete record.

5. **Conrail’s request to reply to a reply.** The Offerors believe the decision in this proceeding should be based on the most complete record possible. Therefore, the Offerors do not object to Conrail filing a reply to the Offerors’ September 30, 2009 filings.

6. **Conrail’s objection to Riffin referring to himself as a carrier.** Whether Riffin is, or is not a carrier, is irrelevant in this proceeding. However, Conrail keeps repeating the mantra, “Riffin is not a rail carrier,” and keeps referring to the Board’s improvidently issued decision in FD 35345. For the record, and for those who have not followed the litigation between the Board and Riffin in the U.S. Court of Appeals, District of Columbia Circuit, the following is provided.

A. The issue of whether Riffin is a carrier is an issue in Case No. 08-1190. The issue of whether it was unlawful for CSX to deed Riffin’s Allegany County line to an entity that never received authority to acquire a line of railroad, is the subject of Case No. 08-1208. Both were scheduled for oral argument on September 18, 2009. In an effort to bolster its case in 08-1190, the Board improvidently issued its September 15, 2009 decision in FD 35345, then argued in the Court of Appeals that the case had been mooted by the Board’s September 15, 2009 decision. At

oral argument, the Court reminded the Board that the court's decision must be based on the record before the Board at the time the Board made the decision that is the subject of the appeal, and stated that consequently, the Board's September 15, 2009 decision will not be considered by the Court. The Court then spent 1/3 of the Board's oral argument time questioning the Board's reliance on *Suffolk and Southern*, FD 35036, a decision that also was promulgated after the decision being reviewed by the Court. The only issue left is whether it was arbitrary or capricious for the Board to rule that Riffin's Cockeysville maintenance-of-way ("MOW") facility is not subject to the Board's jurisdiction for the sole reason that it is not 'commercially feasible' for Riffin to truck his MOW equipment 100 miles. Riffin concluded by citing the Supreme Court's ruling in *Pike v. Bruce Church*, 397 U.S. 137, 145-146, 90 S.Ct. 844, 849 (1970), wherein the Supreme Court ruled that where an interstate entity allocates its interstate resources is at the sole discretion of the interstate entity, and that any State statute that infringes on this discretion, is unconstitutional.

B. The Board's September 15, 2009 decision was improvidently rendered, since the issue of Riffin's ownership of his Allegany County Line is presently before the Court of Appeals in Case No. 08-1208. If the Court rules that CSX must convey the Line to Riffin, then the legal basis for the Board's September 15, 2009 decision will vanish. Sometime around November 10, 2009, Riffin will file his Petition for Review, if the Court has not rendered its decision in 08-1208 by that time. The Board's reliance on Riffin's failure to record his Allegany County deed appears to be on shaky ground, for the D.C. Circuit previously ruled in *American Orient Express*, 484 F.3d 554 (DC 2007), that an entity need not own a railroad right-of-way or railroad infrastructure to be classified as a common carrier by rail. The Court quoted the following from *Fla. Power & Light Co. v. FERC*, 660 F.2d 668, 674 (5<sup>th</sup> Cir. 1981):

"Under common law, a common carrier is one who holds himself out as engaged in the business of providing a particular service to the public."

**7. Offerors failure to file their supplemental material earlier.** The Offerors' OFA contained the information required by 49 CFR 1152.27. Prior to the Board's Show Cause Order, there was no reason or need for the Offerors to provide any more information than the regulations stipulate. In *Norfolk Southern Railway Company - Abandonment Exemption - In Orange County, NY*, FD No. AB-290 (Sub-No. 283X) ("*Orange County*"), the carrier asked to be

exempt from the OFA process. Riffin filed a Notice of Intent to File an Offer of Financial Assistance to purchase the line, and strongly objected to NS' request to be exempt from the OFA process. In that proceeding, the Board denied the carrier's request to be exempt from the OFA process. The Board justified its decision as follows:

"The OFA provisions - which permit a party genuinely interested in providing continued rail service to acquire a line for that purpose over the objections of the owner - reflect a Congressional intent that rail service be preserved whenever possible. While exemptions from 49 U.S.C. 10904 have been granted from time to time, they have been granted when the right-of-way is needed for an overriding public purpose (footnote 3) or an important private undertaking (footnote 4), and there is no apparent interest in continued rail service (footnote 5). ... Mr Riffin has shown an interest in providing continued rail service, despite the absence of an active shipper on the line for almost 2 years. Accordingly, the Board finds no basis for undercutting the Congressional objective of maintaining rail service, despite the fact that the prospects for a successful OFA are marginal."

8. Once the Board ordered the Offerors to provide more information than what is statutorily required, the Offerors began to acquire that additional information. Getting shippers to commit in writing to using rail service, with only two weeks notice, is nearly impossible. (Getting an appointment to speak with a shipper's decision maker, can take more than two weeks, particularly in August, when many people are taking vacations.) In addition, getting a shipper to commit to use a **prospective** rail service, is even more difficult. Most shippers respond by saying: "When you actually can provide the service, we will address the issue." In spite of this reticence, the Offerors were actually able to obtain support, until one of Conrail's outside attorneys stated that if a letter of support was executed, Conrail would retaliate. In spite of these many obstacles, the Offerors were able to obtain letters of support, which were submitted to the Board under seal.

9. Since the ultimate issue in this proceeding is whether the Line is needed for continued rail service, any evidence that relates to this issue should be admitted into the record, so long as the proceeding is not unduly delayed. In this case, the Offerors argue the proceeding has not been unduly delayed. In their September 30, 2009 Motion to Withdraw Request for Postponement, the Offerors stated that there was no reason to delay issuing a decision in this proceeding. Unfortunately, Conrail decided to create a new reason to delay a decision: By filing a Motion to Strike. Since by this pleading, the Offerors have responded expeditiously, if Conrail wants to

further expedite this proceeding, it should immediately file whatever it wishes to file. If the Board wants to include Conrail's additional statements in the record, it can do so after the fact. If Conrail were to file its response no later than October 8, 2009, the Board could, if it so desired, begin its deliberations.

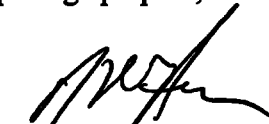
Respectfully,

  
Eric S. Strohmeier

  
James Riffin

**CERTIFICATE OF SERVICE**

I hereby certify that on the 5<sup>th</sup> day of October, 2009, a copy of the foregoing Reply to Conrail's Motion to Strike was mailed via first class mail, postage prepaid, to the parties of record in this proceeding (Conrail, NJT).

  
James Riffin